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CONSPIRACY TO COMMIT ACTS NOT CRIMINAL *PER SE.*

In the absence of any statute against cheating and defrauding, is it a criminal offense to conspire to cheat and defraud?

To answer this question we must consider briefly the law of conspiracy.

From 1200 to 1600 no crime of conspiracy (a combination of two or more to do something illegal as distinguished from a combination of two or more to do something legal) was known to the common law, except what was defined to be such in the statute,[1] the Ordinance of Conspirators. This included confederacies for the false and malicious promotion of indictments and pleas or for embracery or maintenance of various kinds. This law or ordinance was as follows:

"Conspirators be they that do confeder or bind themselves by oath, or covenant, or other alliance, that every of them shall aid and bear the other falsly and maliciously to indite or cause to indite, or falsly to move or maintain pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or fees for to maintain their malicious enterprises; and this extendeth as well to the takers, as to the givers. And stewards and bailiffs of great lords, which by their seigniory, office or power, undertake to bear or maintain quarrels, pleas or debates, that concern other parties than such as

[1] 33 Ed. I. c. 2 (1304).

touch the estate of their lords, or themselves. This ordinance and final definition of conspirators was made and accorded by the King and his counsel in his Parliament the thirty-third year of his reign. And it was further ordained, That justices assigned to the hearing and determining of felonies and trespasses should have the transcript hereof."

It is obvious that this statute covers only the particular classes of confederacies mentioned therein. Therefore it did not include combinations to obtain possession of the goods of another by false and deceitful means, for two reasons; one being that there was no law against such a course by one acting alone; the other being that at that time the doctrine had not arisen that it might be a crime to conspire or combine to do a thing that by itself was neither a crime nor unlawful.

With the necessities of an advancing civilization there came a time when legislation became necessary against the obtaining, by even one person acting alone, of the goods, &c., of another, by means of false or deceitful means, and this led to the passage of the statute 33 Hen. VIII. c. 1 (1541) as follows:

"Forasmuch as many light and evil-disposed persons, not minding to get their livings by truth according to the laws of this Realm, but compassing and devising daily how they may unlawfully obtain and get into their hands and possession goods, chattels, and jewels of other persons, for the maintenance of their unthrifty living, and also knowing that if they come to any of the same goods, chattels and jewels by stealth, that then they, being thereof lawfully convicted according to the laws of this Realm, shall dye, therefore; have now of late falsly and deceitfully contrived, devised and imagined privy tokens, and counterfeit letters in other men's names, unto diverse persons their special friends and acquaintances, for the obtaining of money, goods, chattels and jewels of the same persons, their friends and acquaintances, by colour whereof the said light and evil-disposed persons have deceitfully and unlawfully obtained and gotten great substance of money, goods, chattels and jewels into their hands and possession, contrary to right and conscience:

"For reformation whereof, be it ordained and enacted by authority of this present Parliament, That if any person or persons, of what estate or degree soever he or they be, at any time after the first day of April next coming, falsly and deceitfully obtain or get into his or their hands or possession, any money, goods, chattels, jewels, or other things of any other person or persons, by colour or means of any such false token or counterfeit letter made in any other man's name, as is aforesaid, that then every such person and persons so offending, and being thereof lawfully convict, by witnesses taken before the Lord Chancellor of England for the time being, or by examination of witnesses, or confession taken in the Star Chamber at Westminster before the King's Most Honorable Counsell, or before the Justices of Assize in their Circuits for the time being, or before the Justices of Peace within any part of the King's Domain in their general Sessions, or by action in any of the King's Courts of Record, shall have and suffer such correction and punishment, by imprisonment of (his) body, setting upon the pillowry, or otherwise by any corporal pain except pains of death, as shall to him or them limited, adjudged or appointed by the person and persons before whom he shall be so convict of the said offences, or of any of them."

After the adoption of this statute, it being a criminal offense for one to obtain possession of the goods of another by the false and deceitful means mentioned in this act, i. e., by means of false tokens or counterfeits, it followed without question that any conspiracy or combination to do the same thing was also criminal.

Down to the end of the reign of Queen Elizabeth various statutes were enacted against combinations for treasonable purposes or for breaches of the peace, against combinations by merchants to affect prices, &c., and against combinations by masons and carpenters, by victuallers to raise prices, and by laborers to raise wages or to alter hours of labor.

But no writer, reported case or abridgment of the law, before the 17th century treats of any kind of conspiracy, confederacy or combination as being criminal at the common law, except sometimes the crime of conspiracy as defined by the ordinance of 1304, and it is difficult to see how

conspiracies of this special kind can be called conspiracies under the common law, as they were specifically made criminal by the terms of this ordinance itself.

In other words, this ordinance was more than declaratory of the common law, as it established as criminal that which before was not criminal.

Towards the close of the 17th century, suggestion of a general doctrine that a conspiracy or combination may be criminal, although the object proposed to be accomplished would not be criminal if accomplished by one alone, begins to appear in the arguments of counsel in several cases. In Starling's Case,[1] it was held that a conviction for a combination to "depauperate" the farmers of excise was good, because the indictment set forth that the excise was settled on the King as a part of his revenue, and the "depauperation" of the farmers of excise would prevent them from rendering him the excise. In the argument in Thorp's Case,[2] Starling's Case seems to have been cited by counsel as authority for such a general doctrine as is above stated, but no judgment was given. The doctrine was repudiated in Daniell's Case,[3] by Lord Holt who explained the exceptional ground of Starling's Case, i. e. that the combination "was directly of a public nature and levelled at the government." Accordingly the doctrine was not advanced in argument in Best's Case.[4]

In 1716 Hawkins' Pleas of the Crown was published. He stated the mischievous doctrine:[5] "there can be no doubt but that all confederacies whatsoever wrongfully to prejudice a third person, are highly criminal at common law."

The authorities cited by him[6] furnish no support to this statement, unless by "wrongfully" Hawkins meant "crimi-

[1] (1665) 1 Sid. 174; 1 Keb. 650; 1 Lev. 125. [2] (1696) 5 Mod. 221.

[3] (1704) 6 Mod. 99; 1 Salk. 380.

[4] (1705) 2 Ld. Raym. 1167; 1 Salk. 174; 6 Mod. 185. [5] Bk. cap. 72, §2.

[6] 1354, Art. of Inq.; Lord Gray of Groby (1607) Moor 788; Poulterers' Case (1611) 9 Rep. 55; Moor, 814; Timberley and Childe's Case or Kimberty's Case (1663) 1 Sid. 68; 1 Lev. 62; 1 Keb. 203; 1 Keb. 254; Starling's Case, ut supra; Armstrong's Case (1678) 1 Ventr. 304; Savill *v.* Roberts (1699) 1 Ld. Raym. 374; 5 Mod. 394; 1 Salk. 13; Carth. 414; Best's Case, ut supra. Later editors add Cope's Case (1719) 1 Stra. 144. The Tailors' of Cambridge Case (1721) 8 Modern Rep. 11; Edwards' Case (1725) 2 Stra. 707; 1 Sess. Ca. 336; 8 Mod. 320, and the Prisoners' Case (1786) 1 Hawk. ch. 72, sec. 2.

nal means." "But from this time expressions of a similar kind begin to appear occasionally in judgments, and by the end of the eighteenth century an impression appears to have grown up amongst lawyers, which can only be described by the double proposition that a combination to do an unlawful act is criminal, and that in this phrase 'unlawful' does not necessarily mean 'criminal'."[1]

The doctrine may well be called mischievous, because it allows, and indeed favors, the substitution of a government of men for a government of laws, and it thus leads to the defeat of the cardinal principle of Anglo Saxon justice. Further, it allows and favors interference with a cardinal principle of criminal law, i. e., that there must be certainty in the crime alleged to have been committed. There is no such certainty when a man can be indicted for committing a moral wrong that has not been declared to be a criminal offense by statute, as all would admit. No one knows, or can know under such a system, for what he may not be indicted for combining with others to bring to pass, although for doing the same thing alone he knows he cannot be indicted. Is there not also no such certainty when the moral wrong, instead of having been committed by one person acting alone, has been committed by two or more persons acting together? To maintain that in the latter case an indictment for conspiracy is good, although no indictment would be good for the same moral wrong done by one person alone, is in violation of all sound principles of our system of law.

We must not allow ourselves, nor should any court allow itself, to be misled by the abhorrence all naturally feel against a moral wrong that has been done, into the illogical conclusion that the moral wrong done is also a criminal offense.

It is only in the latter class—that of moral wrongs committed by several acting in concert—that courts have undertaken to subject such common participants to the penalties of the criminal law. All admit that in the first mentioned

[1] The Law of Criminal Conspiracies and Agreements, R. S. Wright—I cite from the edition of 1887, of the Blackstone Pub. Co., Phila., to which is added the Law of Criminal Conspiracies and Agreements as found in the American Cases, by Hampton L. Carson.

class—that of moral wrongs not made criminal by statute—the committer of the moral wrong cannot be subjected to punishment for having committed a crime. Thus the statute 33 Hen. VIII. c. 1 (1541), having been found insufficient because inclusive only of the obtaining of the goods of another by means of false tokens or counterfeit, it became necessary to pass an act to guard against the obtaining of goods, &c., by other false pretences, and accordingly the statute 30 Geo. II. c. xxiv was enacted in 1757, as follows:

"An act for the more effectual punishment of Persons who shall attain, or attempt to attain, possession of goods or money, by false or untrue pretences; for preventing the unlawful pawning of goods; for the easy redemption of goods pawned; and for preventing gaming in publick houses by journeymen, laborers, servants and apprentices.

"Whereas divers evil-disposed persons, to support their profligate way of life, have by various subtle stratagems, threats and devices, fraudulently obtained divers sums of money, goods, wares and merchandizes to the great injury of industrious families, and to the manifest prejudice of trade and credit; Therefore for the punishing all such offenders, Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, That from and after the twenty-ninth day of September one thousand seven hundred and fifty-seven, all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, money, goods, wares or merchandizes, with intent to cheat or defraud any person or persons of the same; or shall knowingly send or deliver any letter or writing, with or without a name or names subscribed thereto, or signed with a fictitious name or names, letter or letters, threatening to accuse any person of any crime punishable by law with death, transportation, pillory, or any other infamous punishment, with a view or intent to extort or gain money, goods, wares or merchandizes from the person or persons so threatened to be accused, shall be deemed offenders against law and the publick peace; and the court before whom such offender or offenders shall be tried, shall in case he, she or they shall be convicted of

any of the said offences, order such offender or offenders to be fined and imprisoned, or to be put in the pillory, or publickly whipped, or to be transported, as soon as conveniently may be (according to the laws made for transportation of felons) to some of his Majesties colonies or plantations in America for the term of seven years, as the Court in which any such offender or offenders shall be convicted shall think fit and order."

It is unhesitatingly conceded that upon all sound principles of criminal law, after the passage of these statutes, not only might any one be punished under them upon committing any of the offenses specified, but also, that two or more persons combining to commit any such offenses might be indicted for conspiracy. What is claimed is that they could not be so punished until then.

The important question often arises whether, in those States of our Union that have not adopted these English statutes or that have not re-enacted them in some form, two or more persons can be indicted for conspiracy to commit acts that are not indictable if committed by a single person?

In Alderman *v.* The People[1], it is said:

"The only words in the object stated, indicating an offence are the words *cheat* and *defraud*. But those words, say the courts, in Com. *v.* Eastman[2], Com. *v.* Shedd[3], and State *v.* Hewett[4], 'do not import any known common law offence. If punishable at all as a crime, it is only when the cheat is affected by false tokens or false pretenses. To make such an object of conspiracy a criminal act, the combination or agreement must be to cheat and defraud in some of the modes made criminal by statute, and the indictment must contain allegations which show, that the cheat and fraud agreed upon are embraced in such statute provisions, and that if perpetrated, would be punishable as a criminal offence.'

"There are no allegations in either part of either count, which show that the cheat and fraud agreed upon are embraced in any statute provision."

[1] (1857) 4 Mich. 414, 433. [2] (1848) 1 Cush. 190.
[3] (1851) 7 Cush. 514. [4] (1850) 31 Me. 396.

In State *v.* Hewett[1], it is said:

"The inquiry, then, is whether the purpose, as charged in the indictment, was criminal or unlawful, at common law, or by statute. Cheating and defrauding a person of property, though never right, was not necessarily an offense at common law. The transaction might be dishonest and immoral, and still not be unlawful, in the sense in which that term is used in criminal law. Cheating by false pretences, or by false tokens, is an offense at common law as well as by statute. R. S. ch. 161, § 1. But the case at bar does not fall within that description of offenses. There is nothing alleged in the indictment, by which we can determine whether the acts charged constitute anything more than a private wrong for which a civil action may lie for damages.

"In one sense all wrongs are unlawful; they are not approved or justified by law, and if injuries result from them, the law may furnish ample remedies; but to hold that they are therefore offenses, unless made such by positive law, would not be consistent with an enlightened system of jurisprudence."

Thus, in the case of the Queen *v.* Jones,[2] the defendant came to A, pretending that B sent him to receive twenty pounds, and he received it; whereas B did not send him. The court said: "It is not indictable, unless he came with false tokens. We are not to indite one man for making a fool of another. Let him bring his action."

It is not maintained that at common law, no kind of cheating and defrauding is an indictable offense. What is maintained is that no mere fraud of this kind, in the absence of a statute, is indictable, *unless it affects the public*, such as the use of false weights in trade, the selling of unwholesome provisions, the rendering of false accounts by a public officer, etc.[3]

To cheat and defraud, however reprehensible it may be, is not an indictable offense at common law.

"But if a man will give credit to the false affirmation of another, and thereby suffer himself to be cheated, he

[1] (1850) 31 Me. 396, 398. [2] (1702) 1 Salk. 379.
[3] 2 Russell on Crimes (Int. Ed.) ch. 32 p. 455.

may pursue a civil remedy for the injury, but he connot prosecute by indictment."[1]

In consequence of this decision the Massachusetts legislature passed an act Feb. 16, 1816, ch. cxxxvi.

"For the suppression and punishment of cheats," obviously drawn from the statute 30 Geo. II. ch. xxiv (1757), as will be seen at once upon comparing the two. The Massachusetts statute begins, "That all persons who knowingly and designedly by false pretence or pretences, shall obtain from any person or persons, money, goods, wares, merchandise or other things, with intent to cheat or defraud any person or persons of the same, shall on conviction thereof....."

The same difficulty in Maine gave rise to the passage of substantially the same law in 1822.

"Cheating and defrauding a person of his property, though never right, was not necessarily an offence at common law. The transaction might be dishonest and immoral, and still not be unlawful in the sense in which that term is used in criminal law."[3]

"The words 'cheat and defraud' do not import any common law offence. If punishable at all as a crime, it is only when the cheat is effected by false tokens, false pretences, or the like; to make such an object of conspiracy a criminal act, the combination or agreement must be to cheat and defraud in some of the modes made criminal by statute; and the indictment must contain allegations, which show that the cheat and fraud agreed upon are embraced in such statute provisions, and that, if perpetrated, they would be punishable as a criminal offence."[4]

"But the common law having been found inadequate to the punishment of many cases of highly injurious fraud, the statute 33 Hen. VIII was enacted, which makes it an indicta-

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[1] Parsons, C. J., in Commonwealth *v.* Warren (1809) 6 Mass. 72, 73, citing Hawk. P. C. 1 c. 71 sec. 2; Rex *v.* Wheatley (1761) 2 Burr. 1125, and Rex *v.* Lara (1796) 6 D. & E. 565. Story, in support of the motion to quash, cited 2 East P. C. 819.

[2] Laws of Maine (1822) ch. xiii.

[3] By Rice, J., in State *v.* Mayberry (1859) 48 Me. 218, 235, citing State *v.* Hewett (1850) 31 Me. 396. See also State *v.* Jones (1862) 13 Iowa 269.

[4] Commonwealth *v.* Eastman (1848) 1 Cush. 189, 227.

ble offence to obtain money, goods, jewels or other things, of any person, by color or means of *any false token*, or counterfeit letter made in any other man's name. It was holden that this statute did not apply to any verbal representations, and to supply this defect the statute 30 Geo. II was passed, by which it is provided that all persons who knowingly and designedly, *by any false pretence or pretences*, shall obtain from any person or persons money, goods, wares or merchandise, with intent to cheat or defraud any person or persons of the same, shall be deemed offenders, etc. The statute 52 Geo. III extends the provisions of the former acts to bonds, bills of exchange, bank notes, all securities and orders for the payment of money or the transfer of goods, or any valuable thing whatsoever."[1]

It was held in this case that the Conn. Statute Tit. 21, Sec. 114 (Ed. 1835) incorporated all the provisions of these several acts of Parliament into the law of Connecticut, and the indictment was sustained.[2] The intimation that the indictment might also be sustainable at common law is therefore clearly only *obiter dictum*. As the court pointed out in the opinion, the statute was broad enough to cover the case before them: "If any person or persons shall willfully and designedly, by color of any false token, pretence or device whatever....."

The class of cases in conspiracy in which conflicting rulings as to the proper form of an indictment arises is, therefore, that of conspiracies to cheat and defraud.

The chief doubt has always been whether such a conspiracy was indictable *per se* at common law, because no cheats were indictable at common law unless they affected the public.

In the United States this class of cases is to be divided into two divisions:

(A) The first, represented by State *v.* Buchanan,[3] held that such a conspiracy was indictable at common law, irrespective of the means employed. These American cases follow the English case of Rex *v.* Gill.[4] In this case the indictment charged that the defendants conspired by divers

[1] State *v.* Rowley (1837) 12 Conn. 101, 110. [2] Id. pp. 113 and 110.
[3] (Md. 1821) 5 Harris & Johnson 317.
[4] (1818) 2 Barn. & Ald. 204.

false pretences to obtain divers large sums of money from A, and to cheat and defraud him thereof. It was held that the gist of the offense being the conspiracy, it was enough to state that fact and its object, and therefore the indictment need not set forth the specific pretences.

"I believe Rex *v.* Gill is generally mentioned as the case of the greatest laxity."[1]

It must not be forgotten that at this time (1818) in England the statute 30 George II (1757) was in force, making any obtaining of money, goods, etc., an indictable offence. It must also be remembered that the case of Rex *v.* Gill was looked upon with doubt in England and was for some time considered overruled, although defensible upon the ground above stated, that any cheating and defrauding is in itself a criminal offence under 30 Geo. II, and therefore in an indictment charging a conspiracy to cheat and defraud the means need not be set forth.[2] Later English cases have rehabilitated this case. Wright, p. 189, correctly summarizes the present state of the law in England on this subject as follows:

"There is recognition, however, in all the cases of the distinction between conspiracies to commit indictable offences, and those to commit an act not in itself unlawful. In the former the indictment need not set forth the means, as the criminality of the act is sufficiently apparent; in the latter the means must be displayed in order to show the illegality.

"Where neither the ends or means are criminal, but the combination has a tendency to prejudice the public or to oppress an individual, it is not clear what the indictment ought to contain; the practice, however, would seem to demand the setting forth of the means wherever practicable."

(B.) The second division above made includes the American cases holding that while it is well settled that an indictment stating that two persons or more conspired to effect an object criminal in itself is good, although it omit all statement of the particular means to be used, it is equally well settled that a general charge of a conspiracy to effect an object not criminal is not sufficient. The charge of such a

[1] By Williams, J., in Queen *v.* Parker (1842) 3 Q. B. 292, 299.

[2] See the interesting discussion of this subject in the Law of Criminal-Conspiracy, by R. S. Wright (Phila. Ed. 1887) 188.

conspiracy must be accompanied with the further statement of the means the conspirators concerted and agreed to use to effect the object, and those means must appear to be criminal. The leading case is that of Commonwealth *v.* Shedd,[1] followed and approved in Commonwealth *v.* Wallace.[2]

To the same effect are the following leading cases:

Lambert *v.* People.[3] Where an indictment for a conspiracy does not set forth the object specifically, and show that such object is a legal crime, it should particularly set forth the *means* intended to be used by the conspirators, and show that those means are criminal. Otherwise it charges no crime the law can notice.

Hartman *v.* Commonwealth.[4] In an indictment for a conspiracy to do an act unlawful in itself, or rendered so by the means intended to be employed in its accomplishment, if the purpose intended to be accomplished is an offence at common law, it is sufficient to set it out by that name: otherwise the intended act must be set forth with such circumstances as to bring it within the terms of the statute.

Alderman *v.* People.[5] "If there be a combination to do an act, not in itself unlawful, but which it is agreed to accomplish by criminal or unlawful means, these means must be particularly set forth, and be such as constitute an offence, either at common law or by statute."

State *v.* Jones.[6] It should appear on the face of an indictment for conspiracy that the object of the conspiracy was criminal or that the means to be employed in attaining it were criminal.

State *v.* Stevens.[7] An indictment for conspiracy (under a statute) must either show that the object of the conspiracy was criminal, or allege facts which show that the means employed to accomplish the object were criminal. See also State *v.* Rickey[8]; Commonwealth *v.* Hunt[9]; Commonwealth *v.* Eastman[10]; State *v.* Roberts[11]; State *v.* Mayberry[12]; State *v.* Keach.[13]

[1] (1851) 7 Cush. 514. [2] (1860) 16 Gray 221.
[3] (N. Y. 1827) 9 Cowen 578. [4] (1846) 5 Pa. St. 60.
[5] (1857) 4 Mich. 414, 432. [6] (1862) 13 Iowa 269.
[7] (1870) 30 Iowa 391. [8] (N. J. 1827) 4 Hals. 293.
[9] (1842) 4 Met. 111. [10] (1848) 1 Cush. 189. [11] (1851) 34 Me. 320.
[12] (1859) 48 Me. 218. [13] (1868) 40 Vt. 113.

"The only real conflict between the cases is where one class, of which State *v.* Buchanan[1] is the type, has extended the law of conspiracy beyond the bounds recognized and prescribed in the other class, of which Commonwealth *v.* Eastman[2] and Commonwealth *v.* Shedd[3] are the best examples. In the first case, it was held that a conspiracy to cheat and defraud was indictable at common law, and therefore it was not necessary to state the means in the indictment, as the object of the conspirators was to accomplish a common law offence. In the latter cases it was held that it was not indictable at common law to conspire to cheat and defraud, unless the means resorted to were criminal, and that therefore, the end not being criminal, the means must be set forth, in order to display the criminality of the act charged. It is believed that this is the only real conflict between the cases, and that if strict attention be paid to the class to which each case cited properly belongs, no reason can exist for confusion of thought or apprehension in regard to the extent or value of the authorities cited."[4]

In the recent case of State *v.* Bacon[5], the court, in its opinion, places much reliance upon the case already above alluded to, saying: "* * * we find ourselves fully in accord with the able opinion of Buchanan J. in State *v.* Buchanan,[6] the leading American case upon the subject of criminal conspiracy, and with the conclusions of the court upon a full review of the cases." But upon examination of this case, decided in 1821, we find that although nominally the conspiracy charged was to cheat and defraud, the indictment states what the alleged means used were, *i. e.*, "and by subtle, fraudulent and indirect means, and divers artful, unlawful and dishonest devices and practices, to obtain and embezzle a large amount of money, and promissory notes for the payment of money, commonly called bank notes, to wit, of the amount and value of fifteen hundred thousand dollars current money of the United States, the same being then and there the property of ....."[7]

[1] (Md. 1821)5 Harris & Johnson 317. [2] (1848) 1 Cush. 189.
[3] (1851) 7 Cush. 514.
[4] Carson on Criminal Conspiracy, ut supra, 202.
[5] (1905) 27 R. I. 252; 61 Alt. 653.
[6] (Md. 1821) 5 Har. & J. 317; 9 Am. Dec. 534. [7] Id. p. 319.

As the State of Maryland, where this case was argued, had statutes against embezzlement, of course a conspiracy to embezzle was maintainable, and everything said in the opinion as to the validity of an indictment for conspiracy to commit an act not indictable when done by one person, is *obiter dictum*. The opinion of the court in the Rhode Island case, so far as it rested upon what was merely *dictum*, it is therefore humbly submitted, cannot be accepted as sound law. Even the learned commentator, Carson, in his examination of the case of State *v.* Buchanan, overlooked the fact that the decision was purely *dictum*, the indictment being valid because of a statute. In the same way, 23 cases relied upon in the brief for the State in the case of State *v.* Bacon, were all wide of the question at issue, as they were all indictments for conspiracy to commit what would have been a statutory crime if commited by one person alone.

AMASA M. EATON.

PROVIDENCE, R. I.